United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1010

Cases No. 1119: KANJ
No. 1120: KANJ

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Jamal K. Kanj, a former staff member of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 25 October 1999, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 December 1999, the Applicant, after making the necessary corrections, filed two Applications. The pleas in the "first case" read as follows:

"II. Pleas: Repatriation Grant, Termination Indemnity and Cost for Shipment

This is to appeal UNRWA's Commissioner-General decision and the Agency's International Staff Joint Appeals Board not to abide by its contractual obligation as a result of terminating my contract with UNRWA. (...)

I was not paid for the Repatriation Grant, Termination Indemnity and the accurate Cost for Shipment as a result of terminating my fixed-term contract with UNWRA."

Whereas the pleas in the "second case" read as follows:

"II. Pleas

This is to appeal UNRWA's Commissioner-General decision and the Agency's International Staff Joint Appeals Board recommendation for the wrongful termination of my contract. (...)

I joined UNRWA on March 2, 1997 as the Project Planning and Design Engineer (PPDE) in the Special Environment Health Programme (SEHP). I will show in this letter that UNRWA violated [United Nations]/Agency [Regulations and Rules] and that appropriate administrative procedures were not observed."

Whereas the Respondent filed his Answers in the "first case" and "second case" on 29 June 2000;

Whereas the Applicant filed Written Observations in the "first case" and "second case" on 12 November 2000 and, on 8 February 2001, the Respondent provided his comments thereon;

Whereas the Applicant submitted an additional document on 17 April 2001;

Whereas the facts in the cases are as follows:

The Applicant entered the service of UNRWA in the Gaza Field Office on 2 March 1997, as an International Staff member at the P-4 level with the title of Project Planning and Design Engineer. The Applicant was appointed for "a fixed-term of one year, subject to six months probation". The letter of appointment stated that "[a]fter completion of the probation, the appointment may, in the light of performance and continued need for the post, be extended to two years".

On 28 April 1997, the Applicant was reprimanded by his supervisor, the Chief, Special Environmental Health Programme (SEHP), for ignoring the latter's instruction concerning the completion of staff members' Periodic Evaluation Reports (PERs). Thereafter, a series of altercations took place between the Applicant and the Chief, SEHP, necessitating meetings with

the Director and Deputy-Director of UNRWA Operations, Gaza, on a number of occasions to address these problems.

On 1 July 1997, the Applicant's PER for the period 2 March to 30 June 1997 was completed. The Chief, SEHP, gave him ratings ranging from "Poor" to "Very Good", and added an additional comment as follows:

> "The staff member has indicated lack of co-operation with his supervisor; he challenged the authority of his supervisor [on] several occasions and did not listen to instructions. He even used unsuitable words and threatened to quit and take the matters to higher authorities. He is not prepared to co-operate in a constructive manner. I recommend therefore that his contract be terminated."

The Director, UNRWA Operations, Gaza, the second reporting officer, gave the Applicant an overall rating of "Poor performance", the lowest possible rating. On 8 July 1997, the Applicant rebutted his PER.

On 25 July 1997, the Director, UNRWA Operations, Gaza, wrote to the Deputy Commissioner-General, UNRWA, Gaza, recommending that the Applicant's contract not be confirmed.

On 4 August 1997, the Applicant was due to return from leave but he did not report for duty. On 7 August, he wrote to the Chief, SEHP, seeking extension of his annual leave for reasons of ill health and advising that he was travelling to Lebanon for treatment. On 11 August the Applicant transmitted a medical report from a neurospecialist in Lebanon recommending two weeks rest.

On 17 August 1997, the Agency learned that the Applicant had moved out of his house in Ramallah on 3 August without leaving a forwarding address. On 20 August 1997, the Applicant advised the Agency that his doctor recommended a further six weeks' rest.

On 31 August 1997, the Director of Administration and Human Resources, UNRWA, Gaza, wrote to the Applicant and advised him that the Agency "had decided not to extend [his] contract beyond the probationary period of six (6) months" and "[t]herefore, [his] fixed-term appointment with UNRWA [would] be terminated effective 1 September 1997".

On 11 September 1997, the Officer-in-Charge, Personnel Services Division (PSD), wrote to the Applicant advising him of the administrative arrangements for the termination of his

service and his entitlements, including shipment of his personal goods and effects. The Applicant replied on 24 September 1997 and informed the Officer-in-Charge, PSD, that he had arranged his own shipment.

On 27 October 1997, the Applicant wrote to the Commissioner-General challenging the termination of his appointment and seeking payments relating to his income taxes and "Separation benefit".

On 17 November 1997, the Applicant sent the Officer-in-Charge, PSD, an invoice in the amount of $13,829.28 and an accompanying Bill of Lading for 40 cubic metres for the shipment of his effects. As the Applicant was only entitled to a shipment of 13.08 cubic metres, he received a prorated reimbursement of $4,522.17.

On 4 December 1997, the Officer-in-Charge, PSD, responded to a query from the Applicant enclosing Staff Regulations and Rules relating to appeals to the Joint Appeals Board (JAB), and further stated "I believe at the time of your recruitment and induction you were given a set of UNRWA Staff Regulations and Rules".

On 26 January 1998, the Chief, Accounts Division, wrote to the Applicant clarifying the rules regarding his entitlement to the reimbursement of shipping costs. On 11 February 1998, the Applicant replied, seeking compensation in lieu of notice and "indemnity compensation", and inquiring further as to why the amount he had been reimbursed for his shipping costs was less than the amount he had paid.

In a letter dated 1 April 1998, which was received by the Applicant on 12 April, the Commissioner-General advised the Applicant *inter alia* that, "as [his] contract was terminated in the interest of the Agency, without notice, [he would] receive payment in lieu thereof" as well as three weeks salary "by way of termination indemnity pursuant to Regulation 9.4(c)", but that he was not entitled to a repatriation grant because he had served for less than one year. The Commissioner-General added that he had "reviewed the papers associated with the circumstances of the termination of [the Applicant's] contract and … regret[ted] to advise [the Applicant] that [he saw] no reason to change that decision".

On 22 April 1998, the Head, International Personnel Section, wrote to the Applicant and explained the appellate procedure of staff rule 111.3 and provided an abbreviated address of the International Staff Joint Appeals Board in Gaza.

On 29 April 1998, the Applicant lodged an appeal with the International Staff JAB in the "second case", in respect of his termination.

On 9 July 1998, the Applicant lodged an appeal with the International Staff JAB in the "first case", concerning the Agency's non-payment of a repatriation grant and failure to fully reimburse his shipping costs.

The JAB adopted its report in the "first case" on 27 April 1999. Its findings and conclusion read as follows.

"***Findings ...***

12. By letter dated 11 September 1997 the Agency informed the Appellant regarding his entitlements and administrative arrangements in connection with his termination from the Agency's service. The Board noted that the Appellant's letter of 27 October 1997 to the Commissioner-General is the Appellant's first letter in which he refers to an issue related in this appeal. In this letter the Appellant makes reference to the payment of a repatriation grant but not to the inadequacy of shipping entitlements.

...

15. International staff rule 111.3 states '*If [the] staff member wishes to make an appeal against the answer received from the Commissioner-General he shall submit his appeal in writing to the Secretary of the Joint Appeals Board within one month from the date of receipt of the answer.*' The Appellant received the Commissioner-General's letter of 1 April 1998 on 12 April 1998 but for reasons, which are not clear to the Board, he did not lodge his appeal until 9 July 1998. The Board also noted that the Appellant received information on appeals procedures via the Agency's letter dated 22 April 1998 and that he lodged his [appeal in the 'second case'] on 29 April 1998.

16. The Board concluded that the Appellant has not raised or substantiated any exceptional circumstances, which would justify non-compliance with the Staff Rules in relation to time limits.

Conclusion

17. The Board decided that the Appellant's appeal is not receivable."

The JAB also adopted its report in the "second case" on 27 April 1999. Its findings and recommendation read as follows.

"***Findings...***

13. The Board concluded that the appeal was receivable.

14. The Board concurs with the views of the Administration that the Appellant has failed to satisfy the onus upon him to show that there has been an abuse of the Commissioner-General's discretionary power.

15. The Board found that the terms of the Appellant's contract including the Letter of Appointment ... and the applicable Agency [Regulations and Rules] had been properly applied and that there was no indication that the Agency's decision had been motivated by prejudice or other extraneous factors.

Recommendation

16. The Board recommends that the Appellant's appeal be dismissed."

On 23 May 1999, the Commissioner-General transmitted a copy of the JAB report in the "first case" to the Applicant, and informed him as follows:

"...

The Administration took a preliminary objection to the receivability of your ... appeal (concerning entitlement to a repatriation grant and reimbursement for shipping costs), because of your delay (i) in seeking the review of the relevant administrative decisions and (ii) in filing an appeal to the Board after you received notification that the decisions you had requested be reviewed, would not be changed. In considering the issue of receivability of the ... appeal, the Board appeared to consider that you had complied with the time limits in the Rules for seeking the administrative review of the relevant decisions. However, the Board concluded that you had substantially exceeded the thirty-day time limit between receiving an answer to [your] request for a review (12 April 1998) and filing your appeal (9 July 1998). The reasons for that delay were not clear to the Board and it noted that you appeared to be well aware of the appeals procedure. In the absence of any exceptional circumstances that might justify waiving the time limit, the Board declared that your ... appeal was not receivable.

It is unfortunate that the Board did not analyze the Administration's first submission regarding the receivability of the appeal and it is not clear to me how it apparently reached the conclusion that you had complied with the time limit between notification of the decisions and then seeking administrative review. However, this issue is of academic interest only in view of the Board's recommendation that your ... appeal is not receivable due to your delay in filing the appeal after receiving notification that the relevant decisions would not be changed.

I accept the Board's conclusion and recommendation. Your ... appeal is ... dismissed."

On the same date, 23 May 1999, the Commissioner-General transmitted a copy of the JAB report in the "second case" to the Applicant, and informed him as follows:

"...

In relation to your ... appeal concerning the termination of your services at the end of the probationary period, the Board analyzed your detailed submissions and those of the Administration and concluded that you had failed to satisfy the onus on you to show that there had been any abuse of the discretionary power to terminate your appointment in the interest of the Agency. Further, the Board found that the terms of your contract, and all applicable [Regulations and Rules] had been properly applied and that there was no indication that the decision was motivated by prejudice or other extraneous factors. Accordingly, the Board recommended that your ... appeal be dismissed.

I accept the Board's conclusions and recommendation. Your ... appeal is dismissed."

On 30 December 1999, the Applicant filed the above-referenced Applications with the Tribunal.

Whereas the Applicant's principal contentions in the "first case" are:

1. The JAB erred in finding the Applicant's appeal non-receivable as time-barred, as the delay was due to the Respondent's failure to inform him of the appropriate appellate procedure.

2. The Respondent failed to comply with its contractual obligations in refusing to pay the Applicant a repatriation grant or termination indemnity.

3. The Respondent failed to comply with its contractual obligations in not fully reimbursing the Applicant for the costs of shipping his personal effects.

Whereas the Respondent's principal contentions in the "first case" are:

1. The Application, in its entirety, is non-receivable by the Administrative Tribunal in accordance with article 7 of the Tribunal's Statute as the Applicant has not exhausted UNRWA's internal remedies.

2. The Applicant's claim is factually incorrect as he received a termination indemnity. Further, the Applicant did not appeal the alleged non-payment of termination indemnity to the JAB, so this claim is non-receivable by the Tribunal.

3. In the event that the Tribunal finds the application receivable, the proper order from the Tribunal would be to remand the matter to the JAB for a rehearing on the merits.

4. As to the merits of the Application, the Applicant received a termination indemnity but was not eligible for a repatriation grant. He received a fair and reasonable reimbursement of the shipping expenses to which he was entitled.

Whereas the Applicant's principal contentions in the "second case" are:

1. The Respondent violated the International Staff Regulations and Rules and failed to observe the appropriate administrative procedures in terminating the Applicant's appointment.

2. The Applicant was the victim of retaliation and a personal vendetta.

3. The JAB failed to address the Respondent's violations of the International Staff Regulations and Rules.

4. The Commissioner-General's discretionary power to terminate a contract does not annul the Agency's contractual obligations.

Whereas the Respondent's principal contentions in the "second case" are:

1. The termination of the Applicant's appointment was a proper exercise of managerial discretion.

2. The onus of proof is on the Applicant to show that the decision to terminate his appointment was tainted by improper motivation or procedural defect.

3. The decision to terminate the Applicant's appointment was procedurally correct and not improperly motivated.

4. The Administrative Tribunal lacks the authority to "interfere with" the JAB's discretionary finding that the decision to terminate the Applicant's appointment was not improperly motivated.

The Tribunal, having deliberated from 11 to 26 July 2001, now pronounces the following judgement:

I. The Applicant has presented the Tribunal with two different cases. His first application concerns "repatriation grant, termination indemnity and cost for shipment"; the second concerns the legality of the termination of his contract by the Administration. Since the applications concern two different alleged wrongs arising from two different administrative decisions sufficiently related to each other to be considered jointly, the Tribunal will deal with them both in the same Judgement.

II. The Tribunal shall first examine the issues of repatriation grant, termination indemnity and shipping costs. The Tribunal finds that as the Applicant did not present the question of termination indemnity to the JAB, it is not receivable. With regard to the Applicant's claim for a repatriation grant and reimbursement of his shipping costs, the Tribunal notes that the JAB found that the Applicant had exceeded the time limits in filing this appeal and that, in the absence of any exceptional circumstances which might justify waiving the time limits, the appeal was not receivable.

III. Staff rule 111.3 (b) provides that "[i]f a staff member wishes to make an appeal against the answer received from the Commissioner-General he shall submit his [a]ppeal in writing to the Secretary of the Joint Appeals Board within one month from the date of receipt of the answer". The Tribunal is satisfied that on 12 April 1998 the Applicant received a letter dated 1 April 1998 from the Commissioner-General, denying his requests for (a) reimbursement of the costs of shipping his personal and household effects, as he had already received payment therefore, and (b) a repatriation grant, as none was payable under the Staff Regulations.

The Tribunal notes that the Applicant presented his appeal to the JAB on 9 July 1998, i.e. more than one month after receiving the above-mentioned letter from the Commissioner-General. It also notes the Respondent's submission "that there are no facts in this case that would cause the [T]ribunal to overcome its well established reluctance to interfere with the Joint Appeals Board's discretionary determinations", in which he cites Judgement No. 315, *Denis* (1983) in support of his contention.

The Tribunal has jurisdiction to override the JAB's "discretionary determinations" if there are indications that the JAB violated due process or that its determinations were improperly motivated. In the present case, the Tribunal has carefully reviewed the proceedings before the JAB as well as all documents submitted to the Tribunal. No indications of improper motivation or undue process have emerged from that examination. Moreover, the Tribunal notes that "the Board concluded that the Appellant has not raised or substantiated any exceptional circumstances, which would justify non-compliance with the Staff Rules in relation to time limits". Certainly, the Tribunal is not persuaded by the Applicant's allegations of his ignorance of the Agency's appeal procedures, and the failure of the Agency to provide him with the postal address of the secretariat of the JAB: first, because ignorance of the law is very rarely admitted as an excuse in any legal process; and, second, because the Agency provided the Applicant with a copy of UNRWA's Staff Regulations and Rules on his entry into service, per his own admission.

In view of the above, the Tribunal considers that the JAB correctly applied staff rule 111.3 (c) and that this application is not receivable.

IV. Insofar as the termination indemnity is concerned, it was not the subject of an appeal to, or recommendation from, the JAB. In Judgement No. 624, *Muhtadi* (1999), the Tribunal stated that:

> "The Respondent's submission is that, because these matters were not before the JAB and in the absence of an agreement to submit them to the Tribunal, they are not receivable by the Tribunal. The Tribunal concludes that issues concerning the Applicant's promotion and evaluation are not properly before it, not having been considered by the JAB."

The Tribunal is satisfied that the same conclusion applies to the Applicant's plea regarding his termination indemnity in the instant case.

V. The second application concerns the termination of the Applicant's contract. The Applicant adduces that the decision to terminate his contract was discriminatory in nature and in retaliation for criticizing his supervisor, rather than due to his deficient service. In accordance with the jurisprudence of the Tribunal, the *onus probandi* falls on the Applicant and the Tribunal is satisfied that he has not proven any of these allegations.

The Applicant does not accept that his services were deficient. However, the Tribunal is satisfied that his services were considered unsatisfactory not so much because of technical deficiencies but because of his general attitude towards his supervisors. A simple reading of the dossier shows that this relationship was, to say the least, not harmonious. The Applicant expressed, with considerable candour, his negative opinions about the working methods and general approach of the Agency. He showed an innate inability to work in accordance with his direct supervisor's directions. The final remark of his PER of 1 July 1997 reads as follows:

> "The staff member has indicated lack of co-operation with his supervisor; he challenged the authority of his supervisor in several occasions and did not listen to instructions. He even used unsuitable words and threatened to quit and take the matters to higher authorities. He is not prepared to co-operate in a constructive manner. I recommended therefore that his contract should be terminated."

The Tribunal agrees with the Respondent that it is unsurprising that such an allegation of insubordination was met with a counter-allegation of personal prejudice.

Furthermore, it is obvious that the Applicant had interpreted the Staff Regulations and Rules in a rather unique fashion. He attempted to obtain certified sick leave when he was obviously not fulfilling any of the conditions of staff rule 106.3, and he shipped his personal and household goods without any regard to the established procedure governing such shipments. The

Tribunal finds that it is not unnatural that such behaviour resulted in negative reactions from the Applicant's superiors and that such reactions do not constitute prejudice or discrimination.

VI. It is clear that the Agency has a margin of discretion in terminating contracts. This is apparent from staff regulation 9.1 which provides that "[t]he Commissioner-General may at any time terminate the appointment of a staff member if, in the Commissioner-General's opinion, such action would be in the interest of the Agency".

In addition, in contracts such as that held by the Applicant, the use of the term "probation" indicates that a staff member must complete a period in which he must demonstrate efficiency and adaptation to his working conditions. The dossier in the instant case, however, leaves one with the strange impression that the Applicant believed it was the Agency that was on probation and that he was charged with evaluating the Agency's working methods and general approach to its task. While the Tribunal is of the opinion that constructive criticism should be welcomed even from a newcomer, it does not consider that the Applicant's behaviour can be so classified.

VII. The Applicant contends that he should have been kept in the Agency's service until the end of his contract. The Tribunal notes that the Applicant's contract was for a period of one year, subject to six months probation. Furthermore, his letter of appointment stated,

> "A fixed-term appointment may be terminated prior to its expiry date in accordance with the relevant provisions of the Staff Regulations and Staff Rules, in which case the Agency will give thirty days' written notice. Should your appointment be thus terminated, the Agency will pay such indemnity as may be provided for under the Staff Regulations and Staff Rules".

Since the Commissioner-General authorized payment in lieu of notice, and termination indemnity under staff regulation 9.4, the Tribunal is satisfied that the Agency complied with its obligations towards the Applicant and finds that the claim must fail.

VIII. In view of the foregoing, the Applications are rejected in their entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary